Howzat! The High Court, Negligence and Indoor Cricket

Introduction

The game of cricket contributed to the law of torts through the House of Lord's decision in *Bolton v Stone*.[1] As the law develops, so does the game and in a recent decision, the High Court was called upon to consider its progeny: the sport of indoor cricket. *Woods v Multi-Sport Holdings Pty Ltd*[2] deals with the obligations of an indoor cricket centre to its players and is a good example of how the factors relevant to determining the issue of breach of the duty of care are balanced.

Unfortunately for sports lawyers, or those with a more general interest in tort law, this case does not shed much light on when liability will be found. The Court was split in its decision with both majority and minority judgments producing compelling reasons. Nevertheless, there are still a few interesting observations that can be made about the case.

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[1] [1951] AC 850. Note the judicial criticism of this case. It has been suggested that this decision was not firmly grounded in legal principle but was instead informed by 'policy considerations concerning English cricket'. (*Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 50 per Murphy J) See also McPherson J in *Wilkinson v Joyceman* [1985] 1 Qd R 567 at 590.

[2] (2002) 186 ALR 145, [2002] HCA 9. The citations that follow refer to the ALR reference.

Facts

Michael Woods, the appellant, was blinded in one eye during a game of indoor cricket. He was an experienced cricketer although he had played only one game of the indoor variety prior to his accident. The injury occurred when the appellant mistimed a pull shot with the result that the ball ricocheted off the bat into his eye. This accident happened at a facility owned and operated as a business by the respondent, Multi-Sport. The respondent organised the games of indoor cricket and also supplied some equipment to players.

The appellant sued alleging a breach of the duty of care in two respects. The first was that the respondent was negligent for failing to provide the appellant with proper eye protection. The second breach alleged was the failure of the respondent to warn the appellant by way of a sign of the dangers of indoor cricket, and in particular, of the risk of serious eye injury. The District Court of Western Australia found that a duty of care existed but that it had not been breached. The Full Court of the Supreme Court of Western Australia dismissed the appeal.

The High Court's Decision

The High Court also dismissed the appeal although only by a narrow margin. Gleeson CJ wrote the main judgment of the majority with which Hayne J generally agreed. Callinan J wrote a separate judgment but reached the same

conclusion as the Chief Justice. Kirby and McHugh JJ formed a persuasive minority and each wrote their own judgment.

There was no dispute that the respondent owed the appellant a duty of care, nor was the formulation of the content of that duty in issue. The parties accepted, as stated by the trial judge, that the respondent had to 'take reasonable steps to avoid the risk of injury to players arising from the dangers involved in playing indoor cricket'.[3] The issue before the Court was whether the respondent had breached that duty of care. The appellant contended that it had in failing to provide eye protection and failing to give a warning. The High Court considered these two potential breaches in some detail.

Eye Protection

The majority held that the trial judge was not in error in finding that the respondent did not need to provide eye protection. Reasonableness did not require that this precaution be taken and the majority referred to a number of factors supporting this conclusion. The first was the low risk of a player's eye being injured. All of the majority accepted the trial judge's assessment that the likelihood of injury was comparatively small at only two serious eye injuries per year for a total of 12 500 indoor cricket players in Western Australia.

[3] Ibid at 146 per Gleeson CJ.

Another consideration was the availability and practicality of eye protection appropriate for indoor cricket. The arguments centred on helmets as the most suitable sort of protection because it was accepted that eye goggles, such as those used in squash, provided insufficient protection against an indoor cricket ball. The first point made by the majority was the absence of helmets specifically designed for indoor cricket. Conventional cricket helmets were suggested as an alternative although it was found that they were inappropriate for the indoor game.

To support this finding Gleeson CJ, and to a lesser extent Callinan J, considered in some depth the evidence given as to the nature of indoor cricket. The physical nature of the game was of particular importance. Indoor cricket is played in confined spaces with players moving very quickly in close proximity to each other. The prevalence of diving and sliding was noted and there was also evidence of what was described as 'clashing' between fielders and batters.[4] Gleeson CJ called it a 'body contact sport'.[5]

The majority considered the high level of physical contact between fast moving players to be significant. Conventional cricket helmets have both visors and face guards that protrude some distance beyond the player's face. The visor, which provides shade for the player, can be removed but the face guard has to remain. It was suggested that the wearing of such helmets with protruding face guards in a contact sport like indoor cricket might actually

[4] Ibid at 147 per Gleeson CJ.

[5] Id.

create other dangers for players in collisions. The majority noted that the evidence showed that fielders were at as much risk of eye injury as batters so all players would be wearing helmets. This many players all wearing helmets and moving at speed in a confined area would further increase the danger of injury.

A third and final factor that the majority considered was the customary standards of the sport of indoor cricket. The rules of the Australian Indoor Cricket Federation 'actually discourage'[6] the use of helmets as a player needed to seek permission to wear one. There was evidence before the trial judge that this rule was grounded in the concerns already discussed about the inappropriateness of helmets for indoor cricket. There was also evidence that the wearing and supply of helmets was not part of the standard practice of other indoor cricket players and organisers. The trial judge gave weight to this evidence and the majority was of the view that she did not err in doing so. She made it clear that she did not consider herself bound by it by saying: 'It is not a question of "just because everyone else is doing it that makes it right".'[7] The majority accepted that the trial judge used this evidence only to help determine what was reasonable.

The majority concluded that it was reasonable for the respondent not to provide eye protection for the appellant. The risk of eye injury was small, there were no helmets that were appropriate for indoor cricket and the rules and

[6] (2002) 186 ALR 145 at 149-150 per Gleeson CJ.

[7] Ibid at 180 per Callinan J.

practice of the game actually discouraged the wearing of such equipment. On this evidence, the trial judge did not err in reaching the conclusion that she did.

The minority of Kirby and McHugh JJ disagreed. One of their main concerns was the undue weight given by the trial judge to the customary standards of indoor cricket. Kirby J felt that she erred because she 'surrendered the standard of care required by the law to the rules made by the Federation.'[8] Both judges asserted that the reach of the common law extends to the sporting field and that it is for the courts to decide when negligence has occurred. Their view of the case was that the respondent had been negligent in failing to provide eye protection for the appellant and identified the factors that underpinned this conclusion.

The first of these factors was that the risk of injuries to the eye was not small. Both judges cited evidence before the trial judge that showed that eye injury had become a sufficiently common occurrence to have raised awareness in the medical profession of this particular danger. A couple of doctors who gave evidence had become so concerned that they had been actively promoting better eye safety for the sport of indoor cricket.

A second factor was the gravity of the potential harm. Total blindness in one eye is a significant injury. Kirby J said: 'Conducting business at the cost of an average of two players blinded in one eye each year in the State of Western

[8] Ibid at 172.

Australia, and doing nothing, does not, in my view, amount to reasonable conduct.'[9] This was contrasted with evidence about other sports such as lacrosse and ice hockey where eye protection had virtually eliminated these sorts of injuries.

The minority also thought that an appropriate helmet (a conventional cricket helmet with the visor removed) was available for use in indoor cricket. Both judges found evidence that suggested this piece of equipment would not cause injury to other players. Again, a comparison was made with other sports where a protruding face guard had not caused problems. Such a precaution was not unreasonable because the trial judge made a specific finding that providing or hiring helmets of this kind was commercially viable.

The minority concluded that there was an appropriate, affordable precaution that would eliminate or significantly reduce the risk of eye injury. When balanced against the seriousness of losing the sight in an eye and the probability of such an injury occurring, it was not reasonable for the respondent to fail to act. This was particularly so in light of the fact that the injury occurred while the respondent was pursuing its business for profit. Both judges found that the trial judge had erred and that the respondent had breached its duty of care.

[9] Ibid at 173.

Warning

The second alleged breach of the duty of care was the respondent's failure to warn the appellant of the risk of injury, and in particular, the risk of eye injury. The evidence suggested that a sign saying 'Players play at own risk' was often displayed at the facility. However, the trial judge was not satisfied that the sign was on display on the two occasions that the appellant played indoor cricket.

Again, the majority held that the trial judge was entitled to find that the respondent had not breached its duty of care in failing to warn the appellant of this risk. The trial judge referred to 'inherent risks', that is, those risks that were 'by their nature obvious to persons participating in the sport.'[10] She contrasted these risks with those that contained an 'unusual or hidden danger' that would raise the need for a warning.[11] The trial judge categorised the risk of being hit in the eye by a ball during a game of indoor cricket as one that was obvious to players. As a result, she found that no warning was required.

All three judges in the majority thought it relevant that the sport of indoor cricket posed risks of many different types of injuries.[12] It was not reasonable to require that all of these risks be identified and brought to the attention of

[10] Ibid at 151 per Gleeson CJ.

[11] Id.

[12] (2002) 186 ALR 145 at 151, 153 per Gleeson CJ, at 178 per Hayne J and at 182 per Callinan J.

potential players. In relation to the increased chance of sustaining an eye injury in indoor cricket as opposed to the outdoor game, a warning of this increased risk was not required. Warning signs are 'not intended to address matters of precision.'[13]

The minority disagreed and thought that the judge erred in not requiring a warning to be given. It was not self evident nor obvious that indoor cricket posed a particular risk of increased eye injury when compared with the outdoor version of the game. Reasonable care required that potential players be warned of this increased risk. The minority would have ordered a new trial on this point to determine whether the warning would have prevented the injury. In reaching his decision, Kirby J specifically stepped away from the 'obviousness' of a risk as the sole criterion for determining when a warning is required. Although this is still very relevant to the whether a duty to warn arises, the issue must be decided by reference to all of the circumstances of the case.[14]

Comment

The High Court in *Woods* decided that the respondent indoor cricket centre had acted reasonably in not providing helmets or a warning about the risk of eye injury. However, it is premature for sporting organisations and associations (and their insurers) to breathe a sigh of relief. This decision

[13] Ibid at 153 per Gleeson CJ.

[14] Ibid at 174-175.

provides only limited guidance as to when liability in sporting contexts will be found.

The main reason for this is that *Woods* involved an unusual fact situation in that the rules of the Australian Indoor Cricket Federation discouraged the use of helmets. This circumstance had an impact on the majority's decision and it is at least arguable that one of the judges may have reached a different view without this factor. This decision may not be useful as a general indicator of when negligence will be found because it is unlikely that other sports would actively discourage the use of safety equipment in the same way. In fact, it can be argued that in relation to indoor cricket, contrary to the result in *Woods*, this case might actually increase the likelihood of liability. The trial judge suggested that it might be time for the Australian Indoor Cricket Federation to develop an appropriate helmet that can be used safely as part of the game.[15] Having been put on notice, a failure by the Federation to act on this suggestion may be considered negligent.

A second reason why *Woods* provides limited guidance is that the Court was divided in its decision. Although the majority concluded that the duty of care had not been breached, the minority produced very compelling judgments, particularly in relation to the issue of eye protection. A different composition of the Court may have resulted in a finding of liability. One reason why the Court was divided in its decision was because the issue of breach of the duty of care is a question of fact. As Gleeson CJ specifically noted, it was a question

[15] Ibid at 150 per Gleeson CJ.

on which judges might reach different conclusions.[16] In fact, both Gleeson CJ and Kirby J were careful to emphasise that the assessment of breach in this case was a question of fact.[17]

Questions of fact are decided on the evidence and another reason why it is difficult to discern direction from this case is that the majority and the minority treated the evidence very differently. On a number of the issues, the judges seemed to reach different conclusions because they relied on the evidence of different witnesses. For example, the majority relied on medical evidence to conclude how uncommon eye injuries in indoor cricket were and compared them with the total number of players participating in the sport. In contrast, the minority stressed the awareness that existed amongst the medical profession as to the high incidence of eye injuries. Another example was the Court's consideration of the appropriateness of conventional cricket helmets for the indoor game.

An important consideration for the High Court was the way in which the relationship between the appellant and the respondent was characterised. Gleeson CJ and Callinan J, characterised the relationship as one that involved the voluntary use of a recreational centre by an adult. Callinan J, in particular, emphasised this relationship saying it would be rare that a warning

[16] Ibid at 153.

[17] Ibid at 154 per Gleeson CJ and at 174-175 per Kirby J.

about the likelihood of injury would be required in a sporting context.[18] On the other hand, Kirby and McHugh JJ strongly emphasised the business aspect of the relationship. They mentioned on a number of occasions that those who profit from an activity have particular safety obligations.

What does *Woods* mean for the law of negligence on the sporting field? The first thing it does is highlight something most practitioners already know: it can be very hard to advise in this area. *Woods* provides an excellent illustration of how difficult it can be to predict whether a duty of care has been breached. A second point is that sporting bodies should not rely on this case when making decisions about how they want to operate their activity or game. The members of the Court were divided and the case was decided on a very particular set of facts. It is worth noting by those advising sporting bodies, that Callinan J continued to indicate his very clear view that promoters and organisers of sport would only rarely, if ever, be required to warn of the possibility of being injured while participating in a game.

A third matter is that practitioners must be conscious of how the relationship between the parties will be characterised by a court. Business and profit-making relationships are more likely to attract liability than relationships characterised as voluntary recreations engaged in by an adult. A final point to note, at the risk of stating the obvious, is that the question of whether the duty

[18] Ibid at 182 per Callinan J. See also *Agar & Ors v Hyde* (2000) 201 CLR 552 at 600-601 per Callinan J for further discussion of the relationship between a sporting body and the participants in that sport.

of care has been breached is always going to be a question of fact. *Woods* may not be a watershed in the development of the law of torts like *Bolton v Stone*[19] and its consideration of cricket. However, it is an interesting case and provides a good illustration of how difficult it can be to determine when a sporting body will in breach of a duty of care owed to its participants.

[19] [1951] AC 850.